No. 12,233

IN THE

United States Court of Appeals

For the Ninth Circuit

HOMER C. PRICE,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", dismissing appellant's petition for writ of habeas corpus and discharging writ of habeas corpus. (T. 53-54.) At the time the action was brought the Court below had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453, now superseded by Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below dismissing the petition is now conferred upon this Honorable Court by Title 28 U.S.C.A., Section

2253, but prior to September 1, 1948 such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

Prior to the filing of the petition for writ of habeas corpus on which the order for the issuance of the writ was entered herein (T. 2), appellant, an inmate of the United States Penitentiary at Alcatraz, California, had filed three petitions in the District Court of the United States for the Northern District of California, all of which had been denied. The facts leading up to the issuance of the writ herein are found in the opinion of the Supreme Court of the United States in *Price v. Johnston,* 334 U.S. 266, and are likewise set forth in pages 73 through 79, inclusive, of the Transcript of Record (hereinafter referred to as "T.") in a statement by counsel for the appellee, the Warden of the said penitentiary, made during the hearing on the writ before the Court below, the correctness of which statement was not disputed by counsel for the appellant. Originally, as above indicated, our case at bar was entitled *Price v. Johnston,* but on the day the writ was issued it was changed to *Price v. Swope* to reflect the fact that during the pendency of the action James A. Johnston had retired as Warden of the penitentiary at Alcatraz, to be succeeded by E. B. Swope, the appellee herein. (T.1.) Appellant's original complaint was, in the instant case, that the Government had knowingly employed false testi-

mony before the trial Court to secure his conviction of the offenses of armed bank robbery and kidnapping, but at the inception of the hearing on the writ, at which time appellant was represented by counsel (T.1) he was permitted to amend his petition to include an allegation that the Government had knowingly deprived him of his right of appeal from the judgment of conviction heretofore entered against him. (T. 80 and T. 83.) During the hearing, evidence both oral and documentary was introduced, and appellant testified in his own behalf. Thereafter, written memoranda were filed by both parties, after which the matter was submitted. Thereupon, the Court below, after considering the cause, filed its order dismissing the petition for writ of habeas corpus and discharging the writ of habeas corpus (T. 53-54, and Appendix I to this brief), and made findings of fact and conclusions of law adverse to appellant. (T. 55-64, and Appendix II to this Brief.) From this latter order, appellant now appeals to this Honorable Court. (T. 68.)

CONTENTIONS OF APPELLANT.

The appellant, as above indicated, contends in substance that

(1) the Government knowingly employed false testimony to secure his conviction;

(2) the Government knowingly deprived him of his right of appeal from his judgment of conviction.

QUESTION.

Are the contentions of the appellant supported by the record?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

The appellee respectfully calls the attention of this Honorable Court to the undisputed finding of the Court below that the appellant "is a confirmed criminal, and prior to his sentence by the trial Court had a long record of previous felony convictions". (T. 105-106.) Thus the Court below could have disbelieved everything the appellant said and by relying solely on the presumption laid down by the Supreme Court of the United States in

Johnson v. Zerbst, 304 U.S. 458, 468,

that when collaterally attacked, the judgment of the Court carries with it the presumption of regularity, could have also properly arrived at the conclusion, which it did, that the appellant was not denied due process of law. See also

Hall v. Johnston, 86 Fed. (2d) 820, 821,

wherein this Honorable Court declared:

> "* * * the trial Court had jurisdiction and as nothing appears upon the face of the record to indicate the contrary, the presumption will obtain that the defendant's rights were carefully guarded throughout the proceedings."

Bearing in mind this presumption, and bearing in mind also the familiar rule that the Court is the sole judge of the credibility of witnesses in a proceeding before it without a jury, and the equally familiar rule that its findings can not be set aside unless clearly erroneous,

Pers v. Hudspeth, 110 Fed. (2d) 812;

Macomber v. Hudspeth, 115 Fed. (2d) 114, 116;

Kelly v. Johnston (C.C.A. 9), 128 Fed. (2d) 793, 794;

Gimpelson v. Kaufman, et al. (C.C.A. 9), 167 Fed. (2d) 672, 675,

the appellee will now discuss the contentions of appellant in the order in which they are raised by him.

I.

THE ALLEGED KNOWING USE OF PERJURED TESTIMONY BY THE GOVERNMENT.

It is the contention of the appellant that a Mr. Fred E. Donner, cashier of the Metamora State Savings Bank of Meetamora, Michigan, had committed perjury during his trial for armed bank robbery and kidnapping, and that the Government suborned such perjury. It is undisputed that when the witness first took the stand he testified that he had not seen a gun during the robbery of the bank, but when he resumed his place on the stand after an adjournment he then testified that he had seen a gun during the holdup. It is also undisputed that during the adjournment Mr. Donner had a conversation with the prosecuting at-

torney, John W. Babcock, and other officials, including an agent of the Federal Bureau of Investigation, Earl K. Richmond. From these facts appellant concludes that the Government officers who attended the conference had persuaded Mr. Donner to change his testimony, knowing that in so doing he was testifying falsely. Mr. Donner, in the habeas corpus proceeding on direct examination, denied this accusation when he testified as follows:

"Q. Did you, during the course of that trial, ever give any false testimony against Homer C. Price?

A. I did not.

Q. Did the agent of the Federal Bureau of Investigation, Mr. Richmond, ever ask you to testify falsely?

A. He did not.

Q. Did Mr. John Babcock, the Assistant United States Attorney, the Chief Assistant who prosecuted the case for the Government, did he ever ask you to testify falsely against Mr. Homer C. Price during that trial?

A. He did not.

Q. Did any Government official ever ask you to testify falsely against Homer C. Price during the course of this trial?

A. No, sir." (T. 200.)

Mr. Babcock, who was also called as a witness on behalf of the appellee, denied that he had requested Mr. Donner, or any other witness, to testify falsely. On direct examination he testified:

"Q. Did you ever ask Fred T. Donner to testify falsely against Mr. Price?

A. No, sir.

Q. Did you ask anyone to testify falsely against Mr. Price during the trial?

A. No, sir.

Q. Do you know if any government official ever asked Mr. Donner to testify falsely against Mr. Price?

A. No, sir.

Q. Do you know if any government officials ever asked anyone to testify falsely against Mr. Price?

A. No. sir." (T. 162-163.)

On redirect examination, Mr. Babcock testified further along the same lines:

"Q. Mr. Babcock, yesterday I asked you if you had ever asked Mr. Donner or any other witness called by the Government to give perjured testimony. Now, let me ask you if while serving as a United States Attorney, did you ever put upon the stand upon the call of the Government any witness whose testimony you knew to be false and perjured?

A. No.

Q. Did you ever offer to introduce any testimony, by Fred T. Donner, or any other witness, in the United States v. Price and Siminov, knowing such testimony to be false, perjured, or untrue in any respect?

A. No, sir." (T. 187.)

For the record it should be noted that Mr. Babcock also testified during the habeas corpus hearing that he did not recall any conference and conversation with Mr. Donner during the adjournment period in ques-

tion, although Mr. Richmond, who was in charge of the investigation of this case, did clearly recall such conference and conversation, at which Mr. Babcock, the United States Attorney John Lehr, and himself were present. On direct examination Mr. Richmond, now no longer with the Federal Bureau of Investigation, stated, in pertinent part, as follows:

"Q. Can you tell us how that conversation happened to take place, if you know?

A. Yes, sir. During examination Mr. Donner was asked a question, this question——

Q. By whom?

A. I can not recall whether the question was asked on cross-examination or whether it was asked by Mr. Babcock.

Q. Go ahead, sir.

A. The question was, 'Did you at any time see a gun in the possession of either of these defendants?' Mr. Donner's answer to that question was, 'No.' As a result of that question and answer, Mr. Babcock asked Mr. Donner to come to his office; the conversation in the office started in this way: Mr. Babcock said to Mr. Donner, 'I am going to ask you a question and I want you to listen carefully. This is the same question—this same question was asked you on the stand: "Did you at any time see in the possession of these *of these* defendants a gun," and Mr. Donner said, 'Yes.' Mr. Babcock then told him that he knew that he was hard of hearing and that he wanted him to listen carefully and to understand each question before he answered.

During the conversation—that ended most of it—well, ended the conversation concerning the question. Mr. Lehr, who was present, said to Mr.

Babcock, Tomorrow morning when we get back on the stand, or back in the trial, if he felt that the attorney for the defense was going to ask Mr. Donner if he was not conferring with us in your office this evening. Mr. Babcock replied that he didn't think that he would, that he would have nothing to gain by it. Whereupon Mr. Donner said, 'If he asks the question, what do I say?' Mr. Babcock said, 'Why, you tell the truth. You answer yes.' " (T. 138-140.)

"Q. Was anything said about Mr. Donner's hearing and the manner in which he should answer questions?

A. In the conversation in the room, Mr. Babcock made it clear to Mr. Donner that he should be certain of what the question was before he answered. Mr. Donner said in the conversation that he understood the question to be, 'Did you see the gun in the bank?' and that is why he answered it no. That is his statement, that he answered it no because he said he did not see the gun in the bank.

Q. Did Mr. Donner ever say where he had seen the gun?

A. He said that he saw the gun when they first stopped him on the street, sort of in the car, or as the gun was coming out of the car.

Q. And you say there was an admontion, not an admonition, but a statement to tell the truth.

A. Mr. Babcock told Mr. Donner to tell the truth.

Q. Was Mr. Donner cautioned about what he should say the next calling of the case?

> A. The only cautioning done was when he asked the direct question, 'What shall I say if they ask me the direct question if I were in this office?' Mr. Babcock said, 'Why, you tell them the truth. Tell them yes.' " (T. 140-141.)

During direct examination, Mr. Richmond also denied that he, or to his knowledge, any Government agent or official had ever asked Mr. Donner, or any witness, to testify falsely against the appellant. (T. 134-135.) It should also be noted that on cross-examination counsel for the appellant was able to derive very little comfort from the answers given him by Mr. Donner, Mr. Babcock and Mr. Richmond, answers substantially the same as given on direct examination.

To summarize—the explanation of Mr. Donner's change in testimony was extremely plausible in view of the fact that he was hard of hearing at the time he testified before the trial Court, a fact which the Court below, from its own observation, knew as a result of hearing Mr. Donner testify in the habeas corpus proceedings. Appellant, a convicted felon, obviously could not prevail, when to believe his uncorroborated accusation would mean that the Court below would have to disbelieve the testimony of Mr. Donner, Mr. Babcock and Mr. Richmond, which it did not do.

In view of the foregoing, it is apparent why the Court below found it to be a fact and also concluded as a matter of law that

"the Government, or any of its agents, did not knowingly, or at all, employ false testimony during the trial of the petitioner to obtain a conviction of the said petitioner". (T. 58, 62; and Appendix II to this brief.)

II.

THE ALLEGED DEPRIVATION OF APPELLANT'S RIGHT OF APPEAL.

The appellant is quite vague in this allegation. He first testified before the Court below that he mailed a notice of appeal to the trial judge, the Honorable Edward F. Moinet (T. 113-114), but later, under cross-examination, he admitted that he had written the trial judge and informed him that he had sent the appeal papers to the clerk of the trial Court. (T. 114-115.) Appellant at one time filed a petition in the United States Court of Appeals for the Sixth Circuit for a writ of mandamus to require the trial judge to enter a decision on his application for an appeal. This petition was denied on the ground that "no application for appeal is pending before respondent or in the United States District Court for the Eastern District of Michigan". (T. 158-159; *Price v. Moinet,* 116 Fed. (2d) 500; certiorari denied, 311 U.S. 703; rehearing denied, 311 U.S. 729.) In evidence, in our case at bar, is also the affidavit of the trial judge denying that an application for an appeal was before him. (Appellee's Exhibit "B", T. 85-87.)

Furthermore, the appellant was not a litigant who stood alone, but one who was represented by counsel

during all stages of the proceedings before the trial Court. As a matter of fact, the appellant's trial Court counsel filed a stipulation on his behalf on May 18, 1938 in a civil proceeding (T. 158), some four days after the judgment in the criminal case had been pronounced. Thus the appellant is not entitled to that degree of solicitude which might conceivably rest upon him were he completely without representation. As pointed out by Mr. Justice Rutledge in the case of

> *Boykin v. Huff,* 121 Fed. (2d) at page 980:
>
> "Judicial objectivity may be served by keeping hands off when parties are adequately represented."

This fundamental doctrine also finds support in the following cases:

De Maurez v. Swope (C.C.A. 9), 104 Fed. (2d) 758, 759;

Moore v. Aderhold, 108 Fed. (2d) 729, 732;

Errington v. Hudspeth, 110 Fed. (2d) 384, 386;

Lovvorn v. Johnston (C.C.A. 9), 118 Fed. (2d) 704, 707;

Osborne v. Johnston (C.C.A. 9), 120 Fed. (2d) 947, 949;

McDonald v. Hudspeth, 129 Fed. (2d) 196, 199.

Finally, Mr. Babcock testified that "so far as anything has been brought to my attention, there was no notice of appeal". (T. 170.) Thus again, the appellant, as above indicated, a convicted felon, is certainly not entitled to be believed when he says, in the light of the overwhelming evidence against him, that the Gov-

ernment officials frustrated him in his attempt to take an appeal from his judgment of conviction. Accordingly, the Court below acted properly when it found both as a fact and as a conclusion of law that

> "neither the trial judge nor the United States Attorney, nor any of his assistants, nor any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him in the trial court." (T. 59, 62; and Appendix II to this brief.)

CONCLUSION.

In view of the foregoing which, in the main, constituted the arguments made by appellee in his memorandum filed in the Court below after the habeas corpus hearing had been concluded (T. 27-40), it is respectfully urged that the judgment of the Court below, amply supported by the evidence, is correct and should be affirmed.

Dated, San Francisco, California,
July 20, 1949.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

I.

[Title of Court and Cause.]

"ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS AND DISCHARGING WRIT OF HABEAS CORPUS.

The evidence adduced upon the hearing held after the issuance of the Writ herein does not support Petitioner's contentions that his constitutional rights were invaded. After a full consideration of all the evidence, both oral and documentary, I am satisfied that the Government or any of its agents did not knowingly, or at all, employ false testimeny during the trial of the Petitioner in Criminal Cause No. 24629 in the United States District Court for the Eastern District of Michigan, to obtain the conviction of the said Petitioner. I am further satisfied that neither the trial judge nor the United States Attorney, nor any of his assistants, nor any of the representatives or agents of the Government, in any way prevented or frustrated the Petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him. I am further satisfied, from testimony developed at the hearing, that the Petitioner was ably represented by counsel at all stages of the proceedings before the trial court; that he was accorded his right of compulsory process of witnesses essential for his defense; that there was no conflict in interest between himself and his co-defendant; that he was accorded a fair trial; and that the

sentence which he is now serving is a valid judgment presently in full force and effect.

The Petition for Writ of Habeas Corpus is, therefore, DISMISSED; the Writ of Habeas Corpus is DISCHARGED; and the Petitioner is remanded to the custody of Respondent.

Respondent will present findings for signature.

Dated: February 16th, 1949.

Michael J. Roche,
United States District Judge."

II.

[Title of Court and Cause.]

"FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above-entitled cause having been submitted by the parties hereto, Fredrik S. Waiss, Esq., appearing as counsel for the petitioner, and Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, and Joseph Karesh, Assistant United States Attorney for the Northern District of California, appearing as counsel for respondent, and evidence both oral and documentary having been introduced and the petitioner having been heard in person under a writ of habeas corpus duly issued, and the Court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

I.

That petitioner is a citizen of the United States.

II.

That petitioner is detained by respondent E. B. Swope as Warden of the United States Penitentiary at Alcatraz, California, under and by virtue of the judgment and sentence of the District Court of the United States for the Eastern District of Michigan (hereinafter called the "trial Court"), in case number 24629, made and entered on May 14, 1938, and transfer order issued at Washington, D.C. on July 2, 1938, signed by Frank Loveland, Acting Assistant Director of the Bureau of Prisons of the Department of Justice ordering the transfer of petitioner from the United States Penitentiary at Leavenworth, Kansas, to the United States Penitentiary at Alcatraz Island, California.

III.

That on February 15, 1938, an indictment was returned to the Grand Jurors of the trial Court in said case number 24629 charging petitioner and a co-defendant, John Simunov, with violations of Sections 588b(a) (b) and 588c of title 12 USCA, that the indictment was in four counts: the first count charging the unlawful entry of a state bank insured by the Federal Deposit Insurance Corporation, with intent to commit a felony or larceny therein; the second count charging the robbing of such insured bank by taking

money from the presence of an employee thereof by force and violence and putting in fear such employee; the third count charging an assault and putting in jeopardy the life of such employee of such insured bank while robbing the same; and the fourth count charging that while committing the offenses alleged in the preceding counts and in avoiding apprehension, petitioner forced such employee to accompany him without the consent of such employee.

IV.

That petitioner was arraigned before the trial Court on the indictment in said cause number 24629 on February 18, 1938, at which time he was represented by counsel, waived the reading of the indictment and pleaded "no guilty" to the charges alleged in the indictment.

V.

That petitioner was tried before the trial Court and a jury on said indictment in said cause number 24629, the said trial commencing on April 19, 1938, and concluding on April 29, 1938, by a verdict of "guilty" on all counts of the indictment.

VI.

That thereafter and on May 14, 1938, the trial Court rendered judgment against the petitioner and sentenced him to imprisonment in a penitentiary to be designated by the Attorney General for a term of sixty-five years.

VII.

That petitioner at the time of his arraignment and at all times thereafter and during the course of his trial before the trial Court knew and understood the nature of the charges contained in the indictment against him.

VIII.

That the petitioner at the time of his arraignment and at all times throughout the trial of his case and at the time of his judgment and sentence was represented by counsel and had the effective assistance of counsel for his defense.

IX.

That the petitioner is a confirmed criminal, and prior to his sentence by the trial Court had a long record of previous felony convictions.

X.

That the petitioner was not denied the right of compulsory process of witnesses essential to his defense.

XI.

That there was no conflict in interest between the petitioner and his co-defendant, John Simunov.

XII.

That the Government, or any of its agents, did not knowingly, or at all, employ false testimony during

the trial of the petitioner to obtain the conviction of the said petitioner.

XIII.

That the petitioner has not sustained the burden of proving that the Government, or any of its agents, knowingly, or at all, employed false testimony during the trial of the petitioner to obtain the conviction of the said petitioner.

XIV.

That neither the trial judge nor the United States Attorney, nor any of his assistants, nor any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him in the trial Court.

XV.

That the petitioner has not sustained the burden of proving that the trial judge or the United States Attorney, or any of his assistants, or any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgments of conviction heretofore entered against him in the trial Court.

XVI.

That at all times in the proceedings before the trial Court, the trial Court had jurisdiction over the person of petitioner and of the offenses alleged in the respective counts of the indictment.

XVII.

That the petitioner was accorded a fair trial before the trial Court.

XVIII.

That the petitioner failed to sustain the burden of proving that he was denied a fair trial before the trial Court.

XIX

That this is the fourth Petition for Writ of Habeas Corpus filed by petitioner herein, all of them—a prior petition in case number 23268-W, a prior petition in case number 23721-R, and a prior petition in case number 25040-S—having been denied by this Court; that the first petition was filed in June 1940; that the second petition was filed in September 1942; that the third petition was filed in August 1945; that on appeal from the first refusal of this Court to discharge petitioner from custody, the judgment was affirmed by the United States Court of Appeals for the Ninth Circuit, in *Price v. Johnston,* 125 Fed. (2d) 806, certiorari denied, 316 U.S. 677; that a like result was reached on appeal in the second proceeding, in *Price v. Johnston,* 144 Fed. (2d) 260; that no appeal was taken from the denial of the third petition.

XX.

That the facts leading up to the issuance of the writ herein are found in the opinion of the Supreme Court of the United States, in the case of *Price v. Johnston,* number 111, October term 1947, decided May 24, 1948, 334 U.S. 266; that the issue with which

the Supreme Court was concerned in its opinion was an allegation by the petitioner that the Government had knowingly used false testimony to obtain the conviction of the petitioner; that after the remand by the Supreme Court and the issuance of the writ, the petitioner was permitted to amend his petition to include an allegation that he had been denied his right of appeal from the judgment of conviction entered before the trial Court; that the other findings of fact heretofore set forth were developed by testimony, oral or documentary, during the course of the hearing on the writ; that during the pendency of the instant proceedings, James A. Johnston retired as Warden of the United States Penitentiary at Alcatraz, California, to be succeeded by E. B. Swope, who was then, pursuant to stipulation of parties, substituted as party respondent in the place and in the stead of the aforesaid James A. Johnston.

CONCLUSIONS OF LAW.

I.

That petitioner at the time of his arraignment and at all times thereafter and during the course of his trial before the trial Court knew and understood the nature of the charges contained in the indictment against him.

II.

That the petitioner at the time of his arraignment and at all times throughout the trial of his case and at the time of his judgment and sentence was repre-

sented by counsel and had the effective assistance of counsel for his defense.

III.

That the petitioner was not denied the right of compulsory process of witnesses essential to his defense.

IV.

That there was no conflict in interest between the petitioner and his co-defendant, John Simunov.

V.

That the Government, or any of its agents, did not knowingly, or at all, employ false testimony during the trial of the petitioner to obtain the conviction of the said petitioner.

VI.

That the petitioner has not sustained the burden of proving that the Government, or any of its agents, knowingly, or at all, employed false testimony during the trial of the petitioner to obtain the conviction of the said petitioner.

VII.

That neither the trial judge nor the United States Attorney, nor any of his assistants, nor any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him in the trial Court.

VIII.

That the petitioner has not sustained the burden of proving that the trial judge or the United States Attorney, or any of his assistants, or any of the representatives or agents of the Government, in any way prevented or frustrated the petitioner in preparing, filing, perfecting, or prosecuting his appeal from the judgment of conviction heretofore entered against him in the trial Court.

IX.

That at all times in the proceedings before the trial Court, the trial Court had jurisdiction over the person of petitioner and of the offenses alleged in the respective counts of the indictment.

X.

That petitioner was not denied due process of law before the trial Court.

XI.

That the petitioner has not sustained the burden of proving he was denied due process of law before the trial Court.

XII.

That the petitioner was not denied any of his constitutional rights before the trial Court.

XIII.

That the petitioner failed to sustain the burden of proving that he was denied any of his constitutional rights before the trial Court.

XIV.

That the petitioner was accorded a fair trial before the trial Court.

XV.

That the petitioner failed to sustain the burden of proving that he was denied a fair trial before the trial Court.

XVI.

That the sentence which petitioner is now serving is a valid judgment presently in full force and effect.

XVII.

That there is no merit to the petition for writ of habeas corpus on file herein.

XVIII.

That petitioner is now in the lawful custody and control of the respondent and is not now entitled to his discharge from the United States Penitentiary at Alcatraz, California.

Dated, San Francisco, California,
March 9, 1949.

Michael J. Roche,
Judge of the District Court."